



**ORDER NUMBER
E-14-25**

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Hydro and Power Authority
Electricity Purchase Agreement Renewal for Marion Creek

BEFORE:
E. B. Lockhart, Commissioner

on November 6, 2025

ORDER

WHEREAS:

- A. On March 28, 2025, British Columbia Hydro and Power Authority (BC Hydro) filed an application (Application) with the British Columbia Utilities Commission (BCUC), pursuant to section 71 of the *Utilities Commission Act* (UCA), to accept for filing an Electricity Purchase Agreement renewal for the Marion 3 Creek Hydroelectric project effective January 30, 2025, for a term of 20 years (2025 EPA);
- B. By Orders G-104-25 and G-144-25, the BCUC established and amended a regulatory timetable for review of the Application, which included, among other things, public notice, BCUC information requests, letters of comment, and BC Hydro responses to letters of comment (if any) and final argument;
- C. The Tla-o-qui-aht First Nation (TFN) filed a letter of comment dated June 5, 2025 in the proceeding;
- D. On June 27, 2025, BC Hydro submitted its response to TFN's letter of comment and its final argument;
- E. In response to a request from the BCUC, TFN and BC Hydro filed further submissions on August 11, 2025 and August 29, 2025, respectively;
- F. BC Hydro requests that the EPA and the redacted information in the Application and other submissions filed in the proceeding be held confidential as they contain information that is commercially sensitive to BC Hydro and/or independent power producers; and
- G. The BCUC has considered the Application and evidence submitted in this proceeding and makes the following determinations.

NOW THEREFORE pursuant to section 71 of the UCA and for the reasons outlined in the decision accompanying this order, the BCUC orders as follows:

1. The 2025 EPA is accepted for filing.
2. The BCUC will hold the unredacted 2025 EPA and the unredacted version of the Application and submissions confidential unless the BCUC determines otherwise, due to their commercially sensitive nature.

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of November 2025.

BY ORDER

Electronically signed by Blair Lockhart

E. B. Lockhart
Commissioner

British Columbia Hydro and Power Authority
Electricity Purchase Agreement Renewal for Marion Creek

DECISION

1.0 Introduction

On March 28, 2025, pursuant to section 71 of the *Utilities Commission Act* (UCA), the British Columbia Hydro and Power Authority (BC Hydro) filed an application (Application) with the British Columbia Utilities Commission (BCUC) for acceptance of an Electricity Purchase Agreement renewal (2025 EPA) with the independent power producer (IPP), Marion Creek Hydro Inc. (Marion Creek IPP), for the Marion 3 Creek Hydroelectric Project (Project). The 2025 EPA has an effective date of January 30, 2025, and a 20-year term commencing February 22, 2025.¹

1.1 Legislative Framework

The BCUC reviews electricity purchase agreements (EPAs) pursuant to section 71 of the UCA and the BCUC's Rules for Energy Supply Contracts for Electricity (ESC Rules).²

Subsection 71(1) of the UCA provides that a person who enters into an energy supply contract must:

- a) file a copy of the contract with the BCUC under rules and within the time it specifies, and
- b) provide to the BCUC any information it considers necessary to determine whether the contract is in the public interest.

Section 71(2.21) of the UCA provides that in determining whether an energy supply contract filed by BC Hydro is in the public interest, the BCUC, in addition to considering the interests of persons in British Columbia (BC) who receive or may receive service from BC Hydro, must consider:

- a) BC's energy objectives;
- b) the most recent of either an integrated resource plan approved under section 4 of the *Clean Energy Act* (CEA) or long-term resource plan filed by the authority under section 44.1;
- c) the extent to which the energy supply contract is consistent with the requirements under section 19 of the CEA;³
- d) the quantity of the energy to be supplied under the contract;
- e) the availability of supplies of the energy referred to in paragraph (d);
- f) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (d); and
- g) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (d).

¹ Exhibit B-1, p. 1.

² ESC Rules attached to BCUC Order G-61-12 dated May 25, 2012.

³ Section 19 of the CEA provides that to facilitate achievement of BC's energy objectives, BC Hydro, and other prescribed public utilities, must pursue actions to meet the prescribed targets in relation to clean or renewable resources. At this time, no regulations have been issued for the purposes of section 19 of the CEA.

A list of BC's energy objectives can be found under section 2 of the CEA and in BC's Clean Energy Objectives Regulation.⁴ The BC energy objectives include the following:

- to achieve electricity self-sufficiency;⁵
- by 2030, to ensure that 100 percent of the electricity generated in BC and supplied to the integrated grid is generated from clean or renewable resources, and to ensure that the infrastructure necessary to transmit that electricity is built;⁶
- to ensure BC Hydro's rates remain among the most competitive of rates charged by public utilities in North America;⁷ and
- to reduce BC greenhouse gas emissions by certain specified amounts and to ensure BC Hydro holds rights to a sufficient amount of clean or renewable electricity to enable BC to meet these reduction targets.⁸

Rule 1.2 of the BCUC's ESC Rules states that in reviewing an energy supply contract filed by BC Hydro the BCUC will "rely on all information it considers necessary to determine whether an [energy supply contract] is in the public interest" and, in doing so, will "consider and be guided by the factors in section 71(2.21) of the [UCA]."

1.2 Regulatory Process

By Order G-104-25 dated April 23, 2025, the BCUC established a regulatory timetable for review of the Application, which included public notice, BCUC information requests (IR), and an opportunity for letters of comment. On May 22, 2025, BC Hydro submitted its response to BCUC IR No. 1, and by letter dated June 5, 2025, the Tla-o-qui-aht First Nation (TFN) filed a letter of comment. No other parties filed letters of comment in the proceeding. On June 27, 2025, BC Hydro submitted its response to the TFN letter of comment and its final argument. By letter dated July 25, 2025, the BCUC invited TFN to provide further submissions regarding Aboriginal title.⁹ TFN submitted its response on August 11, 2025, and BC Hydro filed a reply submission on August 29, 2025.

2.0 Marion 3 Creek Facility and the 2025 EPA

The Project is a run-of-river hydroelectric facility with an installed capacity of 4.6 megawatts (MW) and annual generation output of around 17.5 gigawatt hours (GWh). It is located near Port Alberni on Vancouver Island and is owned by the Marion Creek IPP. BC Hydro states that the Project has been reliably delivering energy to BC Hydro since the commencement of its operations in 2005.¹⁰

The original 20-year EPA with the Marion Creek IPP for the Project was executed in 2001 and expired on February 21, 2025. As such, the Project is eligible for BC Hydro's EPA renewal program (EPA Renewal Program)

⁴ *Clean Energy Act*, SBC 2010, Chapter 22, section 2, retrieved from http://www.bclaws.ca/civix/document/id/complete/statreg/10022_01#section2 and BC's Energy Objectives Regulation, B.C. Reg. 234/2012 retrieved from https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/234_2012

⁵ BC's Energy Objective (a).

⁶ BC's Energy Objective (c).

⁷ BC's Energy Objective (f).

⁸ BC's Energy Objectives (g) and (g.1).

⁹ Exhibit A-6.

¹⁰ Exhibit B-1, pp. 8, 10.

as identified in BC Hydro's most recently filed Integrated Resource Plan (IRP).¹¹ Under this program, BC Hydro is seeking to renew EPAs with clean or renewable resources that are set to expire before April 1, 2026.

Two fundamental components of the EPA Renewal Program are the (a) energy pricing options and (b) terms and conditions based on the Specimen EPA, which is a simpler contract reflecting current standards, terms and conditions, and better aligned with operational requirements. Each EPA is customized to address project-specific issues, such as the physical characteristics of a project or unique additional benefits provided by an IPP.¹²

The pricing options offered under the EPA Renewal Program are: (1) a fixed five-year contract term with a variable energy price, based on a day-ahead Mid-C index, or (2) a fixed 20-year term with a fixed energy price, with a 50 percent escalation factor.¹³ BC Hydro states that the Marion Creek IPP has selected the fixed energy pricing option.¹⁴

BC Hydro notes that terms of the 2025 EPA are broadly consistent with the standard terms and conditions of the Specimen EPA, and project-specific terms include the following:¹⁵

- BC Hydro is not obligated to purchase power generated in excess of hourly and yearly limits;
- the energy price of \$58/MWh escalates at 50 percent of the BC Consumer Price Index (CPI), subject to certain conditions; and
- if the 2025 EPA is terminated following a material default by the Marion Creek IPP, the Marion Creek IPP will pay BC Hydro a termination fee.

The government of British Columbia (BC Government) has issued to the Marion Creek IPP water licences and a 30-year right-of-way and lease agreement for Crown lands legally described as District Lot 2179, Clayoquot District containing 0.7400 hectares (the Lands).¹⁶ BC Hydro submits that the Project currently has all material permits needed to operate. However, certain permits for the industrial lease for the powerhouse and a statutory right-of-way for the intake, penstock, and access road expire in 2037, which falls during the 20-year term of the 2025 EPA. BC Hydro notes that the Marion Creek IPP has indicated that it intends to seek renewal of these permits.¹⁷

3.0 Review of the 2025 EPA

As noted in Section 1.1, the Panel must consider the criteria set out in section 71(2.21) of the UCA when determining whether the 2025 EPA is in the public interest, which we address in Section 3.1. BC Hydro notes that the Project is within the consultative boundaries of TFN and in Section 3.2 we address BC Hydro's submissions regarding any necessary consultation with TFN. The remainder of Section 3 deals with TFN's submissions and BC Hydro's responses to those submissions, which focus on issues related to consultation and Aboriginal Title.

Finally, in Section 3.6, the Panel sets out its determinations on whether the duty to consult has been triggered by BC Hydro's decision to enter into the 2025 EPA and the 2025 EPA's alignment with the criteria set out in

¹¹ Exhibit B-1, pp. 1–2. The BCUC accepted the IRP in March 2024, by Decision and Order No. G-58-24.

¹² Exhibit B-1, Appendix B, pp. 4–7. These components were first used in the EPA renewals for Sechelt Creek, Brown Lake, Pingston Creek, Miller Creek, Rutherford Creek and Mears Creek (see Order and Decision G-50-24).

¹³ Exhibit B-1, Footnote 13, p. 8.

¹⁴ Exhibit B-1, pp. 1–2, 7.

¹⁵ Exhibit B-1, pp. 9–10.

¹⁶ Exhibit B-1, p. 13; BC Hydro Final Argument, p. 6.

¹⁷ Exhibit B-1, p. 13.

section 71(2.21) of the UCA, as well as the Panel’s overall determination regarding the public interest and the acceptance of the 2025 EPA.

3.1 Alignment with UCA Section 71 Criteria

When determining whether the 2025 EPA is in the public interest under section 71 of the UCA, the Panel must consider BC’s energy objectives, and the extent to which the 2025 EPA is consistent with BC Hydro’s most recently filed IRP. The Panel must also consider the quantity, availability, and price of energy under the 2025 EPA as well as the price and availability of any other form of energy that could be used instead.

BC Hydro submits that the 2025 EPA supports BC’s energy objectives, as summarized in Table 2 below.¹⁸

Table 2: BC’s Energy Objectives¹⁹

Energy Objective	BC Hydro Commentary
(a) To achieve electricity self sufficiency.	The Project is in BC, and BC Hydro has exclusive rights to the electricity to satisfy domestic need.
(c) By 2030, to ensure that 100 percent of the electricity generated in BC and supplied to the integrated grid is generated from clean or renewable resources, and to ensure that the infrastructure necessary to transmit that electricity is built.	The Project will supply electricity generated in BC from clean or renewable resources to the integrated grid. Electricity purchased under the 2025 EPA helps BC Hydro meet the 100 percent clean or renewable generation energy objective.
(d) To use and foster the development in BC of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources.	The Project uses proven technology that utilizes clean or renewable hydro resources.
(f) To ensure BC Hydro’s rates remain among the most competitive of rates charged by public utilities in North America.	The levelized unit energy cost for the 2025 EPA is cost-effective under the terms of the EPA Renewal Program.
(g.1) To ensure BC Hydro has sufficient clean or renewable electricity to meet BC’s greenhouse gas emission objectives.	The Project is a clean or renewable resource and contributes to BC Hydro meeting BC’s greenhouse gas emission objectives.
(k) To encourage economic development and the creation and retention of jobs.	The 2025 EPA provides for greater certainty in relation to the continued operation of the generation facility, job retention and economic benefits associated with ongoing expenditures related to the Project.
(l) To foster the development of First Nation and rural communities through the use and development of clean or renewable resources.	The Project is a clean or renewable resource located in BC Hydro’s Vancouver Island load centre. Due to the IPP’s point of interconnection to the BC Hydro transmission system and the local system configuration, a portion of the energy generated from the facility is expected to serve nearby First Nations and rural community customers. ²⁰

¹⁸ Exhibit B-1, Table 3, pp. 20–21.

¹⁹ Table prepared by BCUC Staff based on Exhibit B-1, Table 3, pp. 20–21 and Exhibit B-3, BCUC IR 1.1.2.

²⁰ Exhibit B-3, BCUC IR 1.1.2.

Energy Objective	BC Hydro Commentary
(m) To maximize the value, including the incremental value of the resources being clean or renewable resources, of BC's generation and transmission assets for the benefit of BC	The continued generation of clean or renewable electricity from the Project will facilitate the optimization of BC Hydro's assets.
(o) To achieve BC's energy objectives without the use of nuclear power.	The Project is a clean or renewable hydro resource and contributes to achieving the energy objectives without the use of nuclear power.

With regards to consistency with BC Hydro's IRP, BC Hydro explains that the IRP identified a near-term need to renew clean or renewable IPP projects with EPAs that expire prior to April 2026 and to acquire additional clean or renewable energy. Further, the IRP demonstrated that renewing longer-term contracts at market-based pricing would be cost-effective compared to meeting future load with new clean greenfield resources acquired at a later date.²¹

BC Hydro submits that the 2025 EPA is consistent with the terms of the EPA Renewal Program and generally aligns with the previous eight EPAs renewed pursuant to the EPA Renewal Program, which the BCUC has accepted.²²

BC Hydro submits that the 2025 EPA provides for the continued procurement of electricity at cost-effective pricing because the levelized unit energy cost for the 2025 EPA is below BC Hydro's opportunity cost. As noted in Section 2.0, the Marion Creek IPP opted for the 20-year fixed energy price of \$58/MWh, plus any Project specific adjustments, escalating at 50 percent of BC CPI annually. BC Hydro explains that it calculates the levelized unit cost of energy as the present value of the unit cost of energy over the term of the EPA based on the contractual provisions. BC Hydro notes that its opportunity cost is based on market prices (BC Border Sell Price) during periods of surplus and its Long Run Marginal Cost (LRMC) during periods of deficit. BC Hydro's current estimate of the LRMC for additional energy is \$97 per MWh (Fiscal 2025\$), based on its recent greenfield energy acquisitions pursuant to the 2024 Call for Power. BC Hydro's most recent forecasts show that BC Hydro continues to generally be in an energy deficit position, and as such the opportunity cost for BC Hydro is the LRMC.²³

BC Hydro generally assumes an IPP's alternative to selling to BC Hydro would be sales to a third-party marketer or the export market. BC Hydro values the Marion Creek IPP's opportunity cost based on the BC Border Sell Price with adjustment for delivery from the BC border to Mid-C and further adjustments for Project-specific product characteristics, such as time of delivery, losses, and wheeling costs to the Lower Mainland.²⁴

BC Hydro submits that the levelized unit energy cost of the 2025 EPA is reasonable relative to BC Hydro's opportunity cost, as well as the Marion Creek IPP's opportunity cost and its assumed cost of service. BC Hydro considers that there are potential risks that may be borne by the Marion Creek IPP, such as uncertainty regarding water rental and property tax increases, equipment failure, diversion restrictions, and reduced water flows.²⁵

²¹ Exhibit B-1, p. 6.

²² Exhibit B-1, p. 22; Final Argument, p. 5.

²³ Exhibit B-1, pp. 10–12, Appendix A, pp. 2–3; Final Argument, p. 4.

²⁴ Exhibit B-1, p. 11.

²⁵ Exhibit B-1, p. 12; Footnote 24, p. 12.

BC Hydro submits that the Project has reliably supplied energy for over 20 years, and it is expected to be capable of continued reliable operation and generation of energy at the expected quantity over the entire term of the 2025 EPA.²⁶

Finally, BC Hydro states that the 2025 EPA provides unique benefits to its system. Specifically, the Project's location near Port Alberni results in lower line losses and enhanced reliability within the Vancouver Island load centre.²⁷

3.2 Indigenous Consultation

BC Hydro states that according to the Provincial Consultative Areas Database, the Project is within the consultative boundaries of TFN and that TFN has informed BC Hydro that the Project is located within its traditional territory.²⁸

BC Hydro submits that the duty to consult arises when the Crown has knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect it. Citing the Supreme Court of Canada's (SCC or the Court) decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,²⁹ BC Hydro states that:³⁰

There must be a causal relationship between the *current* conduct or decision in question and a potential for adverse impacts on pending an Aboriginal claim or right. Thus, the duty to consult is not triggered by historical impacts and it is not the vehicle to address historical grievances. If triggered at the lower end of the spectrum, the Crown's obligation may be fulfilled through providing notice, disclosing information, and discussing issues raised by potentially affected First Nations in response to the notice. [citations omitted, emphasis in original]

In BC Hydro's view, the current decision to enter into the 2025 EPA does not result in any incremental impacts on Aboriginal rights and title because:³¹

- there will be no changes to the physical footprint, energy output, or operation of the facility as a result of the 2025 EPA;
- no environmental impacts that resulted from the construction of the original facility are expected to worsen with the continued operation of the facility; and
- the Marion Creek IPP does not intend to cease operations or decommission the Project if the EPA is not renewed.

Notwithstanding the above, BC Hydro states that it recognizes that the duty to consult can be triggered at a low threshold, and has accordingly engaged with TFN in an effort to understand and respond to its concerns regarding the Project and the 2025 EPA.³²

²⁶ Exhibit B-1, p. 22.

²⁷ Exhibit B-1, p. 5.

²⁸ Exhibit B-1, p. 15.

²⁹ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Rio Tinto*).

³⁰ Exhibit B-1, p. 15.

³¹ Exhibit B-1, pp. 15–16; Exhibit B-3, BCUC IR 1.2.3.

³² Exhibit B-1, p. 16.

3.3 TFN Letter of Comment

In its June 5, 2025 letter of comment, TFN submits that neither the BC Government nor BC Hydro has met the Crown's duty to consult with and accommodate TFN in these circumstances.³³ TFN accordingly opposes BCUC acceptance of the 2025 EPA, and requests that the BCUC deny the EPA renewal or suspend its public hearing process pending satisfaction of the Crown's duty to consult and accommodate TFN via the execution of a benefits-sharing agreement among TFN, BC Hydro and/or the Marion Creek IPP, as appropriate.³⁴

Citing *Tsilhqot'in Nation v British Columbia*,³⁵ TFN submits that its Aboriginal title necessarily confers upon its members the right to exclusive use and occupation of the land, including the right to decide how the land will be used and to derive economic benefits from it. TFN states that since the Project's commencement, both Marion Creek IPP and the BC Government have been aware of TFN's interest in sharing in the Project's economic benefits. TFN submits that the current conduct of BC Hydro and the Marion Creek IPP clearly interferes with these rights as both entities benefit from the 2025 EPA while TFN receives no compensation or any other form of accommodation.³⁶

TFN submits that the 2025 EPA will result in novel adverse impacts on, and renewed prejudice to, the economic component of TFN's Aboriginal rights and title. According to TFN, approval of the 2025 EPA extends the life of the Project by 20 years, depriving TFN of the use and benefits from its lands, and during that time, the Marion Creek IPP will accrue substantial economic benefits from the land which, if not for the Project, would accrue to TFN instead. TFN submits that until the conduct of the BC Government, BC Hydro, and the Marion Creek IPP is addressed it would not be appropriate or honourable for BC Hydro and the Marion Creek IPP to continue to profit from breaches of TFN's rights while making no effort to compensate and accommodate TFN.³⁷

TFN submits that BC Hydro's proposal to enter into the 2025 EPA is neither honourable nor in alignment with the spirit of reconciliation.³⁸ TFN argues that the honour of the Crown is relevant not only in the context of the Crown's fulfillment of its duty to consult and accommodate, but also to the question of whether the 2025 EPA is in the public interest.³⁹ TFN submits that the public interest requires the BCUC to consider the honour of the Crown, and whether the Crown has met its constitutional obligations to Indigenous peoples. In TFN's view:⁴⁰

These obligations give rise to a "special" public interest that supersedes other concerns before the BCUC. Where, as is the case here, a decision, authorization, or action breaches the Crown's constitutional obligations, it is not open to the BCUC to find that the decision, authorization, or action is in the public interest.

TFN notes that the Crown's duty to consult and accommodate in relation to projects is only triggered where the decision in question "has the potential of causing a novel adverse impact on a present claim or existing right".⁴¹ TFN argues, however, that its circumstances are distinguishable from *Rio Tinto*, where the SCC held that a 2007 EPA for the Kenney Dam, which was constructed in the 1950s, did not trigger the Crown's duty to consult and

³³ Exhibit D-1, p. 1.

³⁴ Exhibit D-1, p. 7.

³⁵ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot'in*).

³⁶ Exhibit D-1, pp. 1–3, Appendix A, p. 3.

³⁷ Exhibit D-1, pp. 1, 5, Appendix A, p. 3.

³⁸ Exhibit D-1, p. 6.

³⁹ Exhibit D-1, p. 6.

⁴⁰ Exhibit D-1, p. 1, Appendix A, p. 4.

⁴¹ Exhibit D-1, p. 5, citing *Rio Tinto* at paragraph 49.

accommodate because it would not result in any novel adverse impacts on the First Nations' asserted Aboriginal rights and title.⁴²

According to TFN, the Court in *Rio Tinto* considered two types of potential impacts: (1) physical impacts on the fishery along the Nechako River; and (2) organizational, policy, or managerial changes to the dam's operations. TFN explains that, in relation to the first element, the SCC held that the EPA would not result in any physical changes to the dam, and would therefore have no new impacts on the fishery. Regarding the second element, the SCC held that because the Crown would remain present on a new Joint Operating Committee established by the EPA, creation of this committee did not have any adverse impact on the Crown's ability to continue to deal honourably with the First Nations' rights.⁴³

TFN states that it is not alleging the 2025 EPA would result in physical, organizational, policy, or managerial changes to the Project. Rather, TFN submits that the 2025 EPA directly interferes with TFN's ability to derive economic benefit from its lands as it is entitled to do as Aboriginal titleholder, and that the 2025 EPA would perpetuate that interference for another 20 years. In TFN's view, unlike *Rio Tinto*, the Crown's duty to consult is triggered in these circumstances because issuance of a new EPA is a "fresh action" as it relates to the economic component of Aboriginal title.⁴⁴

TFN further submits that the 2025 EPA is not in the public interest because the Marion Creek IPP does not have a tenure under the *Land Act* that would allow it to comply with its obligation to supply electricity for the final eight years of the 2025 EPA.⁴⁵ Nor does the 2025 EPA further BC's energy objective 2(l), regarding fostering development of first nation and rural communities through the use and development of clean or renewable resources, as TFN states that "all of the parties involved refuse to negotiate agreements that would support the economic development and accommodate breaches of TFN Aboriginal Rights and Title".⁴⁶

3.4 BC Hydro Response to TFN's Letter of Comment

BC Hydro argues that TFN's concerns relate to the historical impacts and presence of the Project, and that TFN has not identified any specific incremental impacts on its Aboriginal rights or title arising from the 2025 EPA.⁴⁷ BC Hydro submits the Court in *Rio Tinto* rejected a view of the duty to consult whereby a current decision relating to a project, which in itself will not adversely affect Aboriginal rights, would require consultation on the broader historical impacts of the project.⁴⁸ Further, the only novel impact asserted in TFN's letter of comment relates to their asserted right to derive economic benefit from the Lands. BC Hydro submits that the 2025 EPA does not require the Crown to accommodate TFN's asserted right to the economic fruits of the Lands.⁴⁹

BC Hydro's view is that the legal and factual matrix in *Rio Tinto* is analogous to the decision before the Panel. BC Hydro states that, in *Rio Tinto*, the Court clarified that prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential to cause a novel adverse impact on a present claim or existing right, and that the same conclusion must be reached in this proceeding.⁵⁰

⁴² Exhibit D-1, p. 5.

⁴³ Exhibit D-1, p. 5

⁴⁴ Exhibit D-1, pp. 3, 5.

⁴⁵ Exhibit D-1, p. 7.

⁴⁶ Exhibit D-1, Appendix A, p. 4.

⁴⁷ BC Hydro Final Argument, p. 7.

⁴⁸ BC Hydro Final Argument, p. 9.

⁴⁹ BC Hydro Final Argument, p. 7.

⁵⁰ BC Hydro Final Argument, pp. 8–10.

BC Hydro argues that the 2025 EPA does not extend the life of the Project because irrespective of the 2025 EPA, the Marion Creek IPP, as the holder of water licences authorizing water diversion for power purposes, would be free to sell its energy to other buyers. BC Hydro observes that the Marion Creek IPP does not intend to cease operations or decommission the facility if its EPA with BC Hydro is not renewed.⁵¹

Regarding TFN's argument that it is entitled to the “economic fruits” of the Lands as the “holder of Aboriginal Title”, BC Hydro states that, as clarified in *Tsilhqot'in*, there are two ways in which Aboriginal title can be recognized at law – either by court declaration or through a negotiated agreement – and there is no evidence in this proceeding that TFN holds Aboriginal title to the Lands.⁵² BC Hydro submits that there is no suggestion that TFN has “obtained a court declaration of Aboriginal title over the Lands or entered into an agreement with the Crown that confirms the existence of Aboriginal title”, and that TFN has not cited any case law to support its position that a right to the “economic fruits” of the Lands exists prior to title being established.⁵³ It is BC Hydro's view that such a position would represent a significant departure from established law interpreting section 35 of the *Constitution Act, 1982* and has the potential to require the Crown to negotiate financial accommodation with affected First Nations in any circumstance where a Crown decision is being made to develop or utilize resources in areas where Aboriginal title is asserted but not established.⁵⁴

Further, BC Hydro submits that there is no caselaw to support such a substantive right to financial accommodation as an outcome of the duty to consult. Rather, BC Hydro argues that the purpose of the duty to consult is to “preserve the Aboriginal interest pending claims resolution...” and to prevent damage while claim resolution is underway.⁵⁵

BC Hydro submits that the 2025 EPA will not prejudice TFN's claim to Aboriginal title to the Lands, pending the resolution of that claim, because the 2025 EPA is a commercial agreement which will not result in any physical expansion of the Project or change to the operations of the Project.⁵⁶

Accordingly, BC Hydro submits that the EPA renewal does not trigger a duty to consult.⁵⁷ Further, BC Hydro states that, based on its consultation with TFN to date, any duty to consult which may be owed to TFN has been fulfilled.⁵⁸

3.5 Further Submissions Regarding Aboriginal Title

Following BC Hydro's statement that the *Tsilhqot'in* decision clarified two ways in which Aboriginal title can be recognized, the BCUC sought a submission from TFN and a reply submission from BC Hydro regarding whether TFN has obtained a court declaration of Aboriginal title over the Lands or entered into an agreement with the Crown that confirms the existence of Aboriginal title over those lands.⁵⁹

⁵¹ BC Hydro Final Argument, p. 12.

⁵² BC Hydro Final Argument, pp. 13–14. BC Hydro further refers to Exhibit D-1, pp. 1–2, noting that TFN appears to acknowledge that it “asserts” unceded and unextinguished Aboriginal Rights, including Aboriginal Title.

⁵³ BC Hydro Final Argument, pp. 14–15.

⁵⁴ BC Hydro Final Argument, p. 15.

⁵⁵ BC Hydro Final Argument, p. 15.

⁵⁶ BC Hydro Final Argument, p. 15.

⁵⁷ BC Hydro Final Argument, p. 18.

⁵⁸ BC Hydro Final Argument, pp. 16–18.

⁵⁹ Exhibit A-6.

TFN Submission

TFN states that BC Hydro's assertion that there is no evidence that TFN holds Aboriginal title to the Lands, and the BCUC's request for evidence of formal recognition of TFN's Aboriginal title, "are both rooted in a fundamental misunderstanding of the [SCC's] framework for pre-proof consultation and accommodation and the very nature of Aboriginal title itself" and that "adhering to this flawed line of reasoning would result in a serious error of law."⁶⁰

TFN states that it has not made any representations to BC Hydro or the BCUC that it has received formal recognition of its Aboriginal title. However, TFN submits that a lack of formal recognition does not mean that these rights do not exist.⁶¹

TFN states that Aboriginal rights, including Aboriginal title, do not come into existence once they are proven and recognized in court or by the Crown, but rather are pre-existing legal rights recognized and affirmed under section 35(1) of the *Constitution Act, 1982*. TFN notes that, to date, Canadian courts have only recognized the Aboriginal title of three Indigenous nations (the Tsilhqot'in, the Nuchatlaht, and the Cowichan), and that only one nation (the Haida) has received recognition of its Aboriginal title via negotiated settlement. As such, in TFN's view, it is crucial for many Indigenous nations that they have the opportunity to consult with the Crown and, if appropriate, obtain accommodation for adverse impacts to their rights before their claims have been proven. TFN submits that to allow otherwise would risk diminishing Indigenous nations' inherent constitutional rights or depriving them entirely of these rights.⁶²

TFN refers to the *Hisiikcumyín: Pathway Agreement* (Pathway Agreement) it signed with the BC Government in 2021, wherein the BC Government affirmed its commitment to "move beyond historic legacies of Crown denial, unilateralism, colonialism, and the doctrine of discovery", and instead to promote TFN's goal of maintaining and strengthening its "inalienable spiritual relationship to its lands, waters and tiicmis in the hahuuḥi (ha-houlth-ee) of the ʔaḥuukʷiḥaḥ ʔiiḥ, and uphold[ing] its responsibilities to future generations."⁶³

TFN submits that the Pathway Agreement recognizes the economic aspect of TFN's asserted title, requiring the BC Government to engage with TFN toward the implementation of benefits agreements and other economic opportunities available to TFN. In TFN's view, formal proof of recognition of its Aboriginal title does not need to be provided in order for TFN to be owed consultation and accommodation, generally, and in relation to its right to the economic fruits of the land, more specifically. TFN considers financial accommodation to be the most appropriate way to minimize the 2025 EPA's adverse effects on TFN's Aboriginal title, and to ensure that its rights are not "run roughshod over" pending resolution of its claims.⁶⁴

With respect to whether BC Hydro has met the standard for consultation at the lower end of the spectrum, TFN asserts that, even if TFN was owed consultation at the lower end of the spectrum, which TFN denies, BC Hydro has clearly not met that standard. In TFN's view BC Hydro did not discuss TFN's concerns regarding the 2025 EPA renewal with TFN, and has not demonstrated any true engagement regarding the impacts of the EPA renewal on TFN's Aboriginal right and title.⁶⁵

⁶⁰ Exhibit D-1-2, p. 1.

⁶¹ Exhibit D-1-2, p. 2.

⁶² Exhibit D-1-2, p. 3, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*) at paragraphs 27 and 34–35.

⁶³ Exhibit D-1-2, p. 4.

⁶⁴ Exhibit D-1-2, pp. 4–5.

⁶⁵ Exhibit D-1-2, pp. 6–7.

BC Hydro's Reply

BC Hydro states that it agrees with TFN that, as a general principle, First Nations are not required to prove claims to Aboriginal title in order to be owed consultation and accommodation under the *Haida* framework. BC Hydro states that it regularly consults with First Nations regarding asserted rights and title, and provides financial accommodation where appropriate.⁶⁶

BC Hydro submits that in subsequent decisions, the Court has expanded upon the *Haida* principles, including with respect to the elements required to trigger the duty to consult, and has clarified how these principles would apply in different circumstances. According to BC Hydro, in *Rio Tinto*, the Court clarified that three elements must be met to give rise to the duty to consult:⁶⁷

1. The Crown must have real or constructive knowledge of a claim to the resource or land in question;
2. There must be Crown conduct or a Crown decision that engages a potential Aboriginal right; and
3. There must be a possibility that the Crown conduct will affect the Aboriginal claim or right, requiring the claimant to “show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights.”

BC Hydro submits that in the present case, the first two elements of the *Rio Tinto* test are met: BC Hydro has knowledge of TFN's claim of Aboriginal title, and BC Hydro's decision to enter into the 2025 EPA constitutes Crown conduct that engages a potential Aboriginal right. However, BC Hydro maintains that the third element of test, which requires the potential for adverse impact on the claimed right, is not met in relation to the 2025 EPA.⁶⁸

With respect to TFN's asserted right to the economic fruits of the Lands, BC Hydro submits that it is unaware of any case law in which a court has found that the Crown's receipt of a benefit from economic activity on asserted title lands, in and of itself, gives rise to a substantive duty to provide financial accommodation to the First Nation with the asserted title claim.⁶⁹ Further, if applied broadly, such precedent could require the Crown to negotiate with First Nations in relation to any commercial contract or transaction between the Crown and a third party on asserted title lands, and thus would have significant policy implications.⁷⁰

BC Hydro submits that its decision to continue purchasing power from the Marion Creek IPP is not an adverse impact on TFN that will impair TFN's ability to pursue its claim to the Lands through negotiations with the Crown, and nor will the 2025 EPA prevent TFN from enjoying the economic benefits of Aboriginal title should it be established in the future.⁷¹

BC Hydro concludes that it has meaningfully engaged with TFN to understand TFN's concerns regarding the 2025 EPA and any potential impact arising from BC Hydro's decision to renew it. The process included notice to TFN, holding a meeting, and exchanging multiple letters over a one-year period. BC Hydro submits that despite this, disagreement remains between BC Hydro and TFN as to the existence of any Crown obligation to provide accommodation to TFN in respect of the 2025 EPA.⁷²

⁶⁶ BC Hydro Reply Argument, p. 2.

⁶⁷ BC Hydro Reply Argument, p. 2.

⁶⁸ BC Hydro Reply Argument, pp. 2–3.

⁶⁹ BC Hydro Reply Argument, pp. 3–4.

⁷⁰ BC Hydro Reply Argument, p. 4.

⁷¹ BC Hydro Reply Argument, p. 4.

⁷² BC Hydro Reply Argument, p. 4.

3.6 Panel Determination

For the reasons that follow, the Panel finds that the 2025 EPA is in the public interest and accepts it for filing. Below, the Panel first considers whether the duty to consult has been triggered by BC Hydro's decision to enter into the 2025 EPA. Then, the Panel assesses whether the 2025 EPA is aligned with the criteria the Panel must consider under section 71(2.21) of the UCA, and an overall assessment of whether the 2025 EPA is in the public interest.

The Panel finds that the duty to consult has not been triggered with respect to BC Hydro's decision to enter into the 2025 EPA.

In *Haida*, the SCC stated that the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".⁷³ In *Rio Tinto*, the SCC delineates three elements of the *Haida* test: "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right".⁷⁴ The Panel is guided by this test, as well as other applicable case law.

BC Hydro acknowledges that the first two elements of this test are met with respect to the 2025 EPA, and therefore the key question before the Panel is whether the third element is met – that is, whether BC Hydro's decision to enter into the 2025 EPA has the potential for an adverse impact on TFN's asserted Aboriginal title over the Lands.

BC Hydro submits that the third element of the *Rio Tinto* test is not met. It argues that the legal and factual matrix of the present case is analogous to that in *Rio Tinto*, where the SCC upheld the BCUC's assessment that the EPA renewal did not have the potential to adversely impact the First Nation's claims or rights.⁷⁵ BC Hydro emphasizes that *Rio Tinto* established that there must be a causal relationship between the current conduct or decision in question (in this case, BC Hydro's decision to enter into the 2025 EPA) and a potential for adverse impacts to an asserted Aboriginal claim or right.⁷⁶

TFN, in turn, asserts that the third element of the *Rio Tinto* test is met, and distinguishes the facts in *Rio Tinto* from the present case. TFN acknowledges that the Crown's duty to consult and accommodate in relation to existing projects is only triggered where the current decision in question "has the potential of causing a novel adverse impact on a present claim or existing right".⁷⁷ Further, TFN acknowledges that, in *Rio Tinto*, the SCC held that an EPA renewal did not trigger the duty to consult, following a consideration of physical impacts from the renewal, as well as any organizational, policy, or managerial changes to the associated dam's operations.

TFN states that it is not alleging the 2025 EPA would result in physical, organizational, policy, or managerial changes to the Project. However, TFN submits that the Crown's duty to consult is triggered in this instance, because issuance of the 2025 EPA is a "fresh action" as it relates to the economic component of Aboriginal title. TFN submits that the 2025 EPA directly interferes with TFN's ability to derive economic benefit from its lands as it is entitled to do as Aboriginal titleholder, and that the 2025 EPA would perpetuate that interference for another 20 years.⁷⁸

⁷³ *Haida* at paragraph 35.

⁷⁴ *Rio Tinto* at paragraph 31.

⁷⁵ *Rio Tinto* at paragraphs 93–94.

⁷⁶ Exhibit B-1, p. 15, citing *Rio Tinto* at paragraphs 45, 49 and 83–86.

⁷⁷ Exhibit D-1, p. 5, citing *Rio Tinto* at paragraph 49.

⁷⁸ Exhibit D-1, pp. 3, 5.

Given the foregoing, the Panel considers the key point of difference between the positions of BC Hydro and TFN with respect to the three-element test established by *Rio Tinto* to be whether the 2025 EPA interferes with TFN's ability to derive economic benefit from the Lands as Aboriginal titleholder, such as to cause a potential novel adverse impact on TFN's asserted Aboriginal title.

In this regard, the Panel notes that TFN has stated that it has "not made any representations to BC Hydro or the BCUC that it has received formal recognition of its Aboriginal Title or, by association, its right to derive economic benefit from its lands, nor is it attempting to obtain formal recognition of those rights in these proceedings".⁷⁹ This Panel makes no findings regarding whether TFN has, or does not have, Aboriginal title with respect to the Lands. Further, the Panel acknowledges that, as the SCC states in *Tsilhqot'in*, Aboriginal title confers the right to enjoy the economic fruits of land.⁸⁰

According to the SCC, the purpose of the duty to consult is to preserve the Aboriginal interest pending claims resolution and to prevent damage while claim resolution is underway.⁸¹ The duty to consult may also require accommodation, including taking steps to avoid irreparable harm or to minimize the effects of infringement.⁸² The Panel notes that the 2025 EPA is a commercial agreement that will not result in any physical expansion of the Project or change to the operations of the Project.⁸³ As such, the Panel finds that BC Hydro's decision to enter into the 2025 EPA does not give rise to a potential adverse impact to TFN's claim to Aboriginal title over the Lands, pending the resolution of that claim. The Panel does not consider the fact, in and of itself, that BC Hydro and/or the Crown receive a benefit from economic activity on lands over which a First Nation has asserted title to be sufficient to constitute a potential adverse impact on that First Nation's asserted title.

Put another way, the Panel is not persuaded that BC Hydro's decision to enter into the 2025 EPA, in itself, will prejudice TFN's ability to benefit from the economic fruits of the Lands, if TFN obtains recognition of its Aboriginal title through a court declaration or otherwise in the future. The Panel also notes the observation of the SCC in *Tsilhqot'in* that, once title is established, "it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward".⁸⁴

In light of the above, the Panel finds that the present circumstances are not meaningfully distinguishable from those underlying the SCC's decision in *Rio Tinto*. The third element of the test is not met because we are not persuaded that BC Hydro's decision to enter into the 2025 EPA has the potential for an adverse impact on TFN's pending Aboriginal claims or rights. As such, the duty to consult has not been triggered with respect to BC Hydro's decision to enter into the 2025 EPA.

The Panel next considers whether the 2025 EPA is aligned with the criteria the BCUC must consider under section 71(2.21) of the UCA.

The Panel is satisfied that BC Hydro's continued purchase of hydroelectric power from the Project supports the province's objectives of energy self-sufficiency and the use of clean or renewable resources. Further, the 2025 EPA minimizes the overall cost to BC Hydro and maximizes value to its customers by optimizing existing assets.

The Panel considers the price of energy purchased under the 2025 EPA to be reasonable, and that the 2025 EPA is consistent with the near-term actions in the IRP, which include renewing clean or renewable IPP projects with

⁷⁹ Exhibit D-1-2, p. 2.

⁸⁰ *Tsilhqot'in* at paragraphs 67 and 73.

⁸¹ *Haida* at paragraph 38 and *Rio Tinto* at paragraph 48.

⁸² *Haida* at paragraph 47.

⁸³ Exhibit B-1, p. 15; Exhibit B-3, BCUC IR 1.2.3; BC Hydro Final Argument pp. 7, 10–11, 15.

⁸⁴ *Tsilhqot'in* at paragraph 92.

EPAs expiring prior to April 2026 at market-based prices. The Panel is satisfied that BC Hydro has appropriately considered market prices and cost-effectiveness benchmarks and that BC Hydro's opportunity cost is an appropriate upper benchmark for evaluating the 2025 EPA. In this regard, the Panel is persuaded that the levelized energy unit energy cost for the 2025 EPA is below BC Hydro's opportunity cost and below the expected cost of greenfield energy supply. Thus, the Panel considers the 2025 EPA to be cost-effective and to support BC's energy objective of ensuring BC Hydro's rates remain among the most competitive of those charged by public utilities in North America.

The Panel is satisfied with the quantity and quality of energy to be supplied and notes that the 2025 EPA gives BC Hydro exclusive rights to the energy generated by the Project and that the Project has delivered energy reliably for 20 years. While we recognize TFN's concern that the Marion Creek IPP might not obtain certain key permit renewals, thus shortening the delivery period of the contract, the Panel is not persuaded that the potential for an incomplete term negates the 2025 EPA being in the public interest. The terms of the 2025 EPA reflect consideration of risks related to permit renewals, including the termination and other contract provisions.⁸⁵

Accordingly, the Panel finds that the 2025 EPA is aligned with the criteria the BCUC must consider under section 71(2.21) of the UCA.

Having found the duty to consult has not been triggered in this instance and that the 2025 EPA is aligned with the criteria the BCUC must consider under section 71(2.21) of the UCA, the Panel finds that the 2025 EPA is in the public interest.

4.0 Confidentiality

BC Hydro requests that all confidential information included in Application and that information redacted in Confidential Attachment 1 to IR response 1.2.3 remain confidential as it contains information that is commercially sensitive to BC Hydro and/or IPPs. Further, BC Hydro submits that the public disclosure of such information would harm BC Hydro's negotiating position with respect to future EPAs. BC Hydro requests that the confidential information in this proceeding be kept confidential on an ongoing basis, until otherwise determined by the BCUC.⁸⁶

Given the commercially sensitive nature of the information contained in the redacted documents, the Panel orders that the 2025 EPA and the unredacted version of the Application and submissions filed in this proceeding remain confidential unless the BCUC determines otherwise.

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of November 2025.

Electronically signed by Blair Lockhart

E. B. Lockhart
Commissioner

⁸⁵ Exhibit B-4, Confidential BCUC IR 1.2.1.

⁸⁶ Exhibit B-1, Cover letter, p. 2; Exhibit B-3, BCUC IR 1.2.3.